Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 94-48
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	

COMMENTS OF TIME WARNER CABLE

June 29, 1994

Willkie Farr & Gallagher
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20036

Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, N.Y. 10019

Its Attorneys

TABLE OF CONTENTS

SUMMARY

Time Warner Cable ("TWC"), a division of Time Warner Entertainment Company, L.P. ("TWE") that operates cable television systems throughout the country, submits these comments in response to the Commission's Notice of Inquiry in this proceeding. In particular, TWC offers the following points herein:

- A competitive analysis that limits its inquiry to competition to cable from MVPDs will necessarily understate the true competitive situation.
- Video programming comprises but one part of an array of information and entertainment choices available to consumers.
- The Commission should recognize that cable-delivered video programming competes not only with video programming delivered by other multichannel delivery systems, but also with any means by which video programming is delivered.
- Even when analysis is limited to competition to cable from MVPDs, there is presently significant competition.
- With the likely continued growth of several MVPDs and the ever more prevalent likelihood that local exchange carriers ("LECs") will be providing video programming directly to their subscribers, competition promises to be even more vigorous in the immediate future.
- The Commission had no basis to conclude that overbuild systems engage in collusive pricing. To the contrary, price wars characterize overbuild systems and such

systems typically are not viable in the long run.

- The Commission should amend its rules that have hindered cable operator's ability to compete with satellite master antenna television ("SMATV") operators, including the prohibition against bulk account price discounts and the Commission's cable system definition, which does not consider a SMATV system interconnected between building facilities by microwave or radio to be a cable system.

- In asking commenters to provide specific instances of anticompetitive behavior under the Cable Act and its implementing regulations, the Commission has wrongly presupposed that members of the cable industry, in particular those members that are vertically integrated, have acted in such a manner. The assumption that vertically integrated cable operators either always, or in the main, act anticompetitively is without basis. Indeed, TWC is not aware of any correlation between vertical integration and "bad acts".

- By focusing on the purported negative effects of vertical integration, the Commission ignores the beneficial effects of vertical integration--an integral part of the cable industry's tremendous growth and development.

- The Commission must recognize that its regulations implementing the Act have unduly crimped the industry's ability to realize vertical integration's highly beneficial effects.

- In collecting information going forward for future reports, the Commission should minimize the burdens upon the cable industry and ensure that confidential and proprietary material is secure from third-party disclosure.

Introduction

In the Notice of Inquiry ("NOI") released in this proceeding, the Commission seeks comment on a number of competition-related issues. According to the Commission, the NOI intends to address three goals. First, the Commission seeks sufficient competitive information to fulfill its mandate under § 19(g) of the Cable Television and Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act" or "the Act") to provide Congress with a report "on the status of competition in the market for the delivery of video programming" by October 1, 1994. Second, comments are solicited on the behavior of multichannel video programming vendors ("MVPVs") and multichannel video programming distributors ("MVPDs") under the Act and the Commission's regulations promulgated thereunder. Third, because similar reports are required to be prepared annually, the Commission requests comment on appropriate means to gather competitive information on a going forward basis.

Time Warner Cable ("TWC"), a division of Time Warner Entertainment Company, L.P. ("TWE") that operates cable television systems throughout the country, submits these comments in response to the NOI and addresses the

issues presented by the Commission. In particular, TWC focuses upon the following three points: (1) a competitive analysis that limits its inquiry to competition to cable from MVPDs will necessarily understate the competitive situation for the delivery of video programming; (2) even when analysis is limited to competition to cable from MVPDs, there is a significant amount of competition now and that competition will become even more vigorous in the near future; and (3) the Commission should not presuppose that members of the cable industry, in particular, those members that are vertically integrated, act in an anticompetitive manner, because, by doing so, the Commission will ignore the substantial benefits of vertical integration.

I. LIMITING THE PROPOSED COMPETITIVE ANALYSIS TO MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTORS WILL UNDERSTATE THE TRUE COMPETITIVE SITUATION.

Section 19(g) of the 1992 Cable Act requires the Commission annually to provide reports on competition related to the "market" for the delivery of video programming. In the NOI, the Commission has interpreted this provision to mean it is required to report on the status of non-cable MVPDs. 1/ To be sure, reporting on the

---

1/ See, e.g., NOI ¶ 9 ("we seek to establish a reference point for future comparisons of the status of the multichannel video programming marketplace"); Id. at ¶ 8 (first goal of NOI is to prepare an analysis of "competition

status of MVPDs is a part of the Commission's obligation, and TWC addresses that issue in more detail herein. See part II infra. However, the Commission's narrow focus--only looking at the competition to cable from MVPDs--will result in a more limited competitive analysis than should be undertaken and will understate the true competitive situation.

A. The relevant product market should be defined to include all sources of information and entertainment.

In making any meaningful competitive analysis, the first step is to determine the relevant product market. 2/ Competition between products is a matter of how different in character and use the products may be and the extent to

---

to cable provided by alternative distribution technologies").

2/ See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393 (1956) (holding that a court must assess market power only in terms of the competitive market for a product); Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990) (monopoly power must be demonstrated in the relevant product market); Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc., 714 F.2d 351, 355 (4th Cir. 1983) ("[w]e must first define the relevant [product] market because the concept of competition has no meaning outside its own arena"), cert. denied, 456 U.S. 1027 (1984) ("Continental Cablevision").

which buyers find products to be reasonably interchangeable or substitutes. E.I. du Pont, 351 U.S. at 395. 3/

Admittedly, it has proven somewhat difficult to apply a relevant product market test to the entertainment industry. See, e.g., Nat'l Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 204 (D.C. Cir. 1969) ("entertainment is one industry in which antitrust concepts such as product market and cross-elasticity of demand are exceptionally difficult to apply"). The Commission has reached a similar conclusion with respect to the delivery of video programming. See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600, 5 F.C.C. Rcd. 4962, 4995 (1990) ("1990 Report") ("[d]elineation of an appropriate product market is complicated, since a variety of other media clearly compete

---

3/ See also United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (holding that "commodities reasonably interchangeable" constitute a relevant product market for antitrust purposes). The Supreme Court has stated that "no more definite rule can be declared than that commodities reasonably interchangeable by consumers" are part of the same product market. E.I. du Pont, 351 U.S. at 395. To determine interchangeability, a court may analyze the cross-elasticity of demand between two products, that is, the extent to which sales of one product are responsive to price changes of another. See id. at 395-96; see also Grinnell, 384 U.S. at 571.

with cable systems in the provision of various categories of programming"). 4/

Even so, the essence of defining a relevant product market with respect to video programming is to ask to what extent other products exist that consumers would consider substitutes. Putting aside for the moment the means by which video programming is distributed (discussed infra), video programming comprises but one part of an array of products that inform and entertain. Other sources of information and entertainment that consumers would consider reasonably interchangeable with, or substitutes for, video programming must include such things as live sporting and cultural events, radio and the print media.

For many years, the Commission recognized just such a broad definition of the relevant product market,

---

4/ One reason is that facts particular to a distribution medium, such as broadcast television stations providing programming at a price of zero, often make cross-elasticity evaluations difficult. See Jonathan D. Levy and Florence O. Setzer, Measurements of Concentration in Home Video Markets 37-38 (FCC Office of Plans and Policy Staff Report) (Dec. 23, 1982) ("1982 FCC Staff Report"). Another reason is that technology has rapidly developed and prevented consistent analysis. Indeed, courts have consistently rejected applying antitrust concepts in markets with technologically innovative products. See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 541 (9th Cir. 1983) ("[p]roduct innovation, particularly in such technologically advancing industries . . . is in many cases the essence of competitive conduct"), cert. denied, 465 U.S. 1038 (1984).

indicating that it considered virtually all information and entertainment media to be reasonable substitutes for the same uses. 5/ In its 1990 Report to Congress, however, the Commission departed from that position at least with respect to cable-delivered video programming. Although some commenters had proposed that the relevant product market definition was broad, 1990 Report, 5 F.C.C. Rcd. at 4997 ("radio, the print media, movie and legitimate theater, live events, and other alternatives belong in the market"), the

---

5/ See, e.g., Broadcast Multiple Ownership Rules, 4 F.C.C. Rcd. 1723, 1727 (1989) (concluding radio competes with television stations, newspapers and cable television); Broadcast Multiple Ownership Rules, 4 F.C.C. Rcd. 1741, 1743 (1989) (altering radio-television cross-ownership rule because of "a substantial increase in the availability of alternative media delivery systems") (emphasis added); Harry Boadwee, Product Market Definition for Video Programming, 86 Colum. L. Rev. 1210, 1210 (1986) ("[t]he Federal Communications Commission has suggested that all information and entertainment media are reasonable substitutes"); In re Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17, 25-26, 54 (1984) (discussing how the information market relevant to diversity concerns includes broadcast television, radio, cable television, print and other video media); In Re Amendments Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 95 F.C.C.2d 360, 387-89, n.101 (1983) (suggesting that broadcast television stations, cable systems and other MVPDs compete in "a national market for consumer-oriented video output"); 1982 FCC Staff Report, at 43-51 (all information and entertainment media are reasonable substitutes); Theater Owners, 420 F.2d at 204 (upholding Commission's finding that subscription television was substitutable and competes with other forms of entertainment).

Commission, without further discussion, concluded "the magnitude of their impact appears to be too small". Id. The Commission did not explicate to any degree the rationale for, or the evidence supporting, its newly held position. 6/ In fact, this position conflicted with another conclusion set forth in the 1990 Report--that "these media and activities provide substitutes for some services provided by cable". Id.

With this NOI, the Commission now limits its competitive inquiry to comments about competition to cable provided by MVPDs. Thus, by not even asking commenters to address whether and to what extent other sources of entertainment and information may serve as substitutes for video programming, the Commission has taken its 1990 conclusion--that the impact of such substitutes is small--yet another step, creating the public perception that such substitutes are entirely irrelevant.

That is plainly not the case. For one thing, recent figures indicate that the cable industry today passes about 90.7 million homes but has about 57 million

---

6/ The Commission is obliged to follow its past decisions or at least to explain why it departs from them. See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). The 1990 Report does not contain sufficient explanation under that standard.

subscribers, yielding a penetration level of about 62.8%. See The Kagan Media Index, Feb. 28, 1994, at 14. In other words, over 30 million households that could receive cable television, or about 37%, elect not to do so. Id. Without doubt, some part of this figure must be attributed to the fact that many individuals believe themselves sufficiently entertained or informed without cable television (i.e., by radio, the print media, broadcast television and other such sources). 7/

Moreover, as evidenced by certain cross-ownership restrictions, the Commission (as well as Congress) continue to acknowledge a wide range of substitutes for video programming. See, e.g., 47 U.S.C. § 533(a)(1) (declaring it unlawful for a cable operator to own or control a broadcast license); 47 C.F.R. § 73.3555(d) (restriction against owning an "AM, FM or TV broadcast station" license in community for

---

7/ Recent years have witnessed substantial and rapid growth in the radio and print media industries. For example, the number of AM-FM radio licenses has increased virtually every year and presently stands at 6,579 stations, or over 1,000 licenses more than in 1989. See Television & Cable Factbook, No. 62 (1994) at I-15 (indicating figures as of January 1, 1993). And, daily newspaper subscription revenues have continually increased, growing from about $7.7 billion in 1987, to over $10 billion by 1993. Kagan Media Index, at 15.

which person also owns, operates or controls a daily newspaper). 8/

Given the acknowledgement of competition, it thus seems quite wrong for the Commission to dismiss the effect of substitutes for video programming. It was wrong in 1990, and it is equally so today. 9/ To fail to engage in analysis of the extent to which other sources of entertainment and information may serve as substitutes to video programming simplifies the Commission's methodology, but it will not result in an accurate report to Congress.

8/ Indeed, the Commission typically predicates waivers under such restrictions based on the availability of a variety of media outlets. See, e.g., In re Applications of Brem Broadcasting and WKRG-TV, Inc., 9 F.C.C. Rcd. 1330 (March 15, 1994) (considering number of radio stations and daily newspapers in a community because "relevant indicia" of competition include "the number of separately-owned and operated 'voices' in the market and the presence of cable and non-broadcast media"); In re Application of KVI, Inc., 9 F.C.C. Rcd. 1333 (March 15, 1994) (same).

9/ This is not to say that all alternatives we have cited here are reasonable substitutes for all consumers at all times. However, because the existence of these alternatives is considered by a cable operator in making pricing and service decisions, they are relevant to the competitive analysis. In any event, the FCC has recognized that "even highly imperfect substitutes for a firm's product can have a major effect on the firm's behavior". 1982 FCC Staff Report at 52. The fact that some may not subscribe to cable because they feel the price is too high only proves the existence of powerful competition. There is thus an adequate substitute that is sufficient to overcome the price differential.

B. Limiting the scope of inquiry to multichannel video programming distributors will unduly minimize competition from other sources of video programming.

As mentioned above, the NOI generally limits inquiry to discussing the competition to cable from MVPDs, that is, the competition to cable from multichannel video programming delivery systems. The Commission does, albeit reluctantly, acknowledge that broadcast television stations "warrant inclusion" in its competitive analysis because of a "constraining influence" upon cable. NOI, ¶¶ 50-51. The Commission, however, indicates that such influence is measurable or relevant only in conjunction with the presence of MVPDs. Id. at ¶ 51. 10/

The Commission's approach is far too limited. A competitive analysis of the market for delivery of video programming, in addition to accounting for video programming substitutes, must consider this critical fact: the delivery mechanism is virtually irrelevant to the product in demand--

---

10/ Otherwise, the Commission has taken the position that over-the-air broadcast television simply does not represent effective competition to the full range of programming available via cable. Id. at ¶ 50; see also In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992--Rate Regulation, 8 F.C.C. Rcd. 5631, 5652-53 (1993) ("Rates Order") (rejecting broadcast signals as qualifying as "effective competition" to cable operators).

video programming. 11/ By generally limiting inquiry to MVPDs, the Commission will ignore various other means by which video programming is delivered, including, for instance, broadcast television, video cassettes, theatrical motion pictures, laser discs, and CD-Video. These means of delivering video programming plainly compete with video programming delivered by cable.

In past decisions, the Commission often has recognized that such sources of video programming compete with video programming delivered by cable and other MVPDs. 12/ In fact, the Commission initially defined

---

11/ See Levitch v. Columbia Broadcasting Sys., 495 F. Supp. 649, 664-65 (S.D.N.Y. 1980) (proper approach is to define product market from the perspective of what the viewing audience actually consumes, not the mode of programming delivery).

12/ See, e.g., In re Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, 3 F.C.C. Rcd. 1202, 1208 (1988) (finding home video cassette rentals compete with premium services); Matter of Compulsory Copyright License for Cable Retransmission, FCC Report 87-66, ¶ 10 (Apr. 23, 1987) (recognizing increased competition among MVPDs, theaters, broadcast television stations, low-power broadcast stations and video cassettes); In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, FCC Report 86-357, ¶ 3 (Nov. 28, 1986) (concluding that broadcast television stations and cable television systems "provide services and operate in manners" that are "highly competitive"); In re Amendment of Section 73.355 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, FCC Report 84-350, ¶ 35 (Aug. 3, 1984) (finding that broadcast television competes with multichannel technologies and VCRs).

effective competition to cable for purposes of the Cable Consumer Protection Act of 1984 ("1984 Cable Act") solely in terms of the availability of three broadcast signals--a rule that the D.C. Circuit later upheld. 13/

Even in its 1990 Report, the Commission, although tempering its prior analysis somewhat, continued to indicate that "[b]roadcast television and videocassette rentals provide substitutes" for cable. See 1990 Report, 5 F.C.C. Rcd. at 4994. 14/ That position was endorsed again in 1991, when the Commission reexamined its definition of effective competition and concluded that the availability of six local broadcast television stations represented effective competition to cable. 15/ Necessarily, then, the Commission believed as late as 1991, that the presence of broadcast

---

13/ See ACLU v. FCC, 823 F.2d 1554, 1564-75 (D.C. Cir. 1985), cert. denied sub nom., Connecticut v. FCC, 485 U.S. 959 (1988).

14/ The Commission specified, for example, that broadcast television is "a good substitute" for broadcast television programming available via cable, id. at 4995; that "[t]he substantial penetration of VCRs and the ubiquity of tape rental stores provides a good substitute for commercial free-movie channels", id.; and that "tape rental has some desirable characteristics that compare favorably with those of premium cable channels". Id.

15/ See Re-examination of the Effective Competition Standard for the Regulation of Cable Television Service Rates, 6 F.C.C. Rcd. 4545, 4547-51 (1991); id. at 4566 ("[u]nder our revised rules, a cable system will be presumed to face effective competition if . . . six unduplicated over-the-air broadcast television signals are available").

televisions stations alone effectively would compete with cable.

In this NOI, however, the Commission advocates an approach that generally disregards the above conclusions. For the most part, comments are not solicited about any non-multichannel delivery of video programming. To the extent comment is solicited (i.e., with respect to broadcast television), it is solicited under the assumption that there need also be an MVPD presence in order for the competition provided to be noteworthy.

In addition to being an unexplained about-face from the position the Commission held in 1991, this approach does not square with the fact that a large percentage of people who could receive cable choose not to do so, exactly because they receive video programming from other sources. 16/ The Commission here concedes as much: "[a] significant proportion of the public continues to rely on over-the-air service exclusively". NOI, ¶ 50.

16/ We recognize of course that Congress has defined "effective competition" in the 1992 Cable Act and done so without regard to the presence of non-multichannel delivery systems, such as broadcast television. 47 U.S.C. § 543(l)(1). We merely emphasize here that the considerations underlying the Commission's conclusion just a year before the enactment of the 1992 Cable Act--that non-multichannel delivery systems can provide effective competition--remain relevant to a competitive inquiry that deals with the "market" for video programming delivery and should be addressed in this report to Congress.

Other sources of video programming thus provide powerful competition to delivery by cable systems. As has been the case for many years, the most popular-rated programming provided by cable operators is programming provided by network television. See, e.g., Findings, 1992 Cable Act, § 2(a)(20) (stating that broadcast programming "remains the most popular programming on cable systems"). Even though some cable programming such as movies, music and sports are quite popular, similar programming is also among the most popular available from the networks. 17/ It seems therefore quite erroneous to conclude that video programming provided by non-multichannel delivery (broadcast television stations and VCRs, in particular) is not relevant to the Commission's competitive analysis or to formulating this report to Congress.

It is perhaps for these reasons that, in contrast to the rather narrow view the Commission proposes to take here, courts often have taken a broad view of the relevant

---

17/ Programming similar to that cable provides is of course also available on video cassettes. By the end of 1993, there were about 80.5 million households with VCRs as compared to the approximately 57 million cable households. Kagan Media Index, at 14. Revenues for the home video cassette industry in 1993 exceeded $13 billion. Id.

sources of video programming. 18/ For example, the Fourth Circuit has affirmed a district court decision, which had accepted the parties' agreement that cable television is one part of a market that also includes "cinema, broadcast television, video disks and cassettes, and other types of leisure and entertainment-related businesses". Continental Cablevision, 714 F.2d at 355. Similarly, in Cable Holdings of Ga., Inc. v. Home Video, Inc., 825 F.2d 1559, 1563 (11th Cir. 1987), the Eleventh Circuit upheld a jury finding that cable constitutes one component of a "passive visual entertainment" market. Other components in this market include "video cassette recordings and free over-the-air television". 19/

18/ The fact that it has proven difficult to apply product market concepts to the entertainment industry is yet another reason to favor a broader, not a narrower, market definition.

19/ See also Futurevision Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp., 789 F. Supp. 1760, 1767 n.4 (S.D. Miss. 1992) (acknowledging that courts have held cable television, satellite television, video cassette recordings and free over-the-air television constitute a market for passive video entertainment). Although the recent decision in Storer Cable Communications, Inc. v. The City of Montgomery, Ala., 826 F. Supp. 1338, 1355-56 (M.D. Ala. 1993) has suggested a submarket analysis might be appropriate, the Fourth Circuit has rejected that approach. See Continental Cablevision, 714 F.2d at 355 n.5. And, despite varying characteristics of different media, the Commission has stated that it does not consider them to constitute distinct "submarkets". See, e.g., Multipoint Distribution Service, Notice of Proposed Rulemaking, 104 F.C.C. 2d 283, 292 (1986) (finding that although cable,

For the above reasons, therefore, if the Commission is interested in providing an accurate competitive analysis, it should look beyond the competitive situation merely within the "market" for multichannel delivery of video programming. The proper analysis should consider other (non-multichannel) means by which video programming is distributed and should examine the competitive forces relevant to the product itself--video programming and its substitutes. By limiting analysis to MVPDs, however, the Commission will necessarily understate the true competitive situation for the provision of video programming.

II. OTHER MVPDS ALREADY PROVIDE SIGNIFICANT COMPETITION TO CABLE AND THAT COMPETITION PROMISES TO BECOME EVEN MORE VIGOROUS IN THE NEAR FUTURE.

The Commission asks for comments about the competitive status of a variety of multichannel technologies that compete with franchised cable operators, including: multichannel multipoint distribution service ("MMDS" or "wireless cable"); local multipoint distribution service ("LMDS"); direct broadcast satellite ("DBS"); home satellite dishes ("HSDs"); satellite master antenna television

---

broadcast television, satellite delivery and theatrical pay-per-view have different characteristics, "these differences do not require treatment as distinct relevant product markets or submarkets").

("SMATV") operators; video programming offered by local exchange carriers ("LECs"), including video dialtone; and cable overbuilds. Although for the reasons stated above, TWC believes a competitive inquiry that focuses nearly exclusively upon MVPDs will seriously understate the true competitive situation related to the delivery of video programming, we respond here to a number of the points in the NOI concerning the competition to cable provided by particular multichannel video programming delivery technologies.

A. At present, other MVPDs provide significant competition to TWC's systems.

Replete throughout the NOI are references that appear to indicate the Commission does not believe MVPDs afford strong competition to franchised cable operators at this time. See, e.g., NOI, ¶ 24(h) ("[h]ow long is it likely to take for wireless cable to serve as a competitive alternative to cable"); Id. at ¶ 31 ("[h]ow long is it likely to take for medium-power DBS to serve as a competitive alternative to cable"); Id. (same question for high-power DBS). If that accurately reflects the assumption underlying the NOI, TWC disputes its validity.

It has been TWC's experience that its cable systems, serving approximately 7.1 million subscribers in over 30 States, face strong competition from MVPDs now. At

the present time, there are numerous wireless cable competitors (including an LMDS operator) in areas served by TWC. 20/ Of course, virtually any TWC subscriber could elect to obtain video programming via HSD, and SMATV and cable overbuilds operate within numerous franchise areas served by TWC. As for DBS service, medium-power (Primestar Partners) is available throughout the country and high-power is available in certain areas, including Jackson, Mississippi--an area served by TWC--with national distribution imminent. 21/

The Commission also should be especially attentive to the powerful competitive capability of LECs. For one thing, five video dialtone trials have already been approved

---

20/ The Wireless Cable Association ("WCA") has indicated that MMDS service would be available during 1994 in 23 of the nation's top 25 television markets, representing nearly half of the country's 92.8 million television households. Wireless Cable '94 Operations Predicted in 23 of Top 25 Markets, February 15, 1994, PR Newswire Association, Inc. (available on NEXIS). The WCA has also touted the "more than $400 million" that flowed into the industry during 1993. Id. Moreover, it has been estimated that wireless applications were coming into the Commission at a rate of 1,000 per month and that there was a backlog of about 7,500 applications (with about the same number presently being the subject of legal challenges). See Goal Is Cable Competition, Communications Daily, June 10, 1994 (available on Westlaw).

21/ DBS proponents have stated that DBS "will give cable competition like it's never seen" and that it "will cause major, major problems for cable". See DBS Leaders Predict Satellite Service Will Have a Big Impact On Cable, Satellite Week, March 28, 1994 (available on Westlaw).

by the Commission, including a trial that was approved in, among other places, New York City, where Time Warner Cable operates some of its largest cable systems. For another thing, 22 additional commercial video dialtone applications are presently pending before the Commission and soon to be the subject of expedited Commission action. These applications concern areas throughout the country, including San Diego, Honolulu and Tampa, three large metropolitan areas served by TWC. And, two court decisions have concluded that certain LECs have a right to provide video programming directly to their subscribers. 22/ Bell Atlantic, an LEC benefitting from one of those decisions, has indicated since that decision that it will spend some $11 billion to enable it to deliver video services to its subscribers in the near future.

This competition plainly is relevant in terms or the pricing and service decisions that local TWC divisions must make. To treat this competition as a distant and irrelevant sight on the horizon--as the NOI seems to suggest--would be an egregious business error. The Commission has made exactly this point in another context.

22/ See Chesapeake & Potomac Telephone Co. of Virginia v. United States, 830 F. Supp. 909 (E.D. Va. 1993) and U S West, Inc. v. United States, No. C93-1523R, -- F. Supp. --, 1994 WL 280303 (W.D. Wash. June 15, 1994). The Chesapeake case is now on appeal with the Fourth Circuit.

See In re Evaluation of the Syndication and Financial Interest Rules, 8 F.C.C. Rcd. 8270, 8286-87 (1993) ("When competition looms on the horizon, established businesses will act and plan accordingly, recognizing that if they overreach, their potential competitors are better positioned to match or beat the terms they set."). 23/

The Commission indicates that it is especially interested in receiving comprehensive information about overbuild systems. NOI, ¶ 48. In setting the "competitive differential" at 17% in the Second Order on Reconsideration in rate regulation, In the Matter of Implementation of

---

23/ Even "the potential for competition" constrains established business entities. The Commission stated exactly that in its syndication proceeding. See id. The statement simply reflects hornbook law. Potential competition from outside of a relevant market can have beneficial effects upon prices and competition, "keep[ing] prices and profit margins lower than they would if there was no threat of the outsider entering the market". Boc Intern. LTD v. FTC , 557 F.2d 24, 25 (2d Cir. 1977); see also, United States v. Siemens Corp., 490 F. Supp. 1130, 1132-33 (S.D.N.Y. 1980) (discussing both the pressure exerted on prices by a potential competitor or entrant and the beneficial effects). As long as an outside firm is perceived to be potential competition, even if it is not in fact actual potential competition, the same effects on prices and competition can result. See United States v. Falstaff Brewing Corp., 410 U.S. 526, 533-34 (1973) (finding that defendant was not an actual potential entrant did not foreclose the possibility that defendant was perceived as a potential entrant and thus exerted a procompetitive effect on the market); Siemens, 490 F. Supp. at 1132-33 (discussing perceived potential entrant doctrine); United States v. Black and Decker Mfg. Co., 430 F. Supp. 729, 746 (D.Md. 1976) (discussing Falstaff and perceived potential entrant doctrine).